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IN THE

Supreme Court of the United States

October Term, 1965
No. 325

ROY WRIGHT DE WELLES,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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ROY WRIGHT DE WELLES,

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vs.

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Petitioner, Roy Wright De Welles, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review its judgment affirming a judgment of the United States District Court for the Southern District of Indiana sentencing petitioner to 10 years' imprisonment [Deft. Appx. 38; CT 50].[1]

[1]The Record certified to this Court by the Clerk of the Court below consists of the Brief and Appendix for Defendant-Appellant [Deft. Appx.], the Brief and Appendix of the Plaintiff-Appellee [Pltf. Appx.] and the record in the Court of Appeals [RCA]. Pursuant to Rule 21(4) of this Court there is likewise being filed herewith 9 printed copies of the Briefs and Appendices of the Plaintiff and Defendant respectively and pursuant to Rule 21(3) of this Court there is also being filed the record of the District Court which was certified to the Court of Appeals, consisting of the Clerk's Transcript [CT], the Reporter's Transcript [RT] and Exhibits.

Opinions Below.

Trial in the District Court was by jury.

The opinion of the Court below [RCA, Slip opinion; not yet reported] is appended hereto as Appendix "A".

The judgment of the Court below [RCA, judgment] is appended hereto as Appendix "B".

Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The date of the judgment sought to be reviewed and the time of its entry is March 29, 1965 [RCA, judgment].

2. Timely filed petition for rehearing was denied on May 7, 1965 [RCA, Order]. On May 24, 1965, Mr. Justice Clark granted an extension of time within which to file petition for writ of certiorari to and including July 6, 1965.

3. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 USC 1254(1).

Questions Presented for Review.

1. Where police officers have no warrant of any kind and do not arrest the defendant for the commission of any crime but hold the defendant "for investigation" and take him to the police station for that purpose, does a search of defendant's premises during that detention and before any arrest, violate defendant's rights to freedom from unreasonable search and seizure? In other words, is a "search incidental to a detention for investigation" valid?

2. Assuming the above detention is a valid arrest, may the police officers after removing defendant from his premises to the police station, make a search of the premises in his absence and introduce in evidence against him material so obtained?

3. Where the defendant lives and is in Mississippi and the trial is to be held in Indiana, is the defendant denied due process of law and denied the assistance of counsel where the District Court, on the same day the motion is filed and without there being an opportunity for the defendant to have even received a copy of the motion and without the defendant having notice of when the motion was to be filed or was to be heard, grants the lawyer's motion to withdraw as attorney for defendant? Concomitant with and in addition to the question just put, where the date of the Court's granting the above motion to withdraw is November 19 and the trial date is December 9, is the defendant denied due process of law and the effective assistance of counsel where the defendant subsequent to the November 19th date, on receiving a copy of the Court's order, had to, from Mississippi, and while he was ill, thereafter retain new counsel with whom, because of the distance and the defendant's illness, he was unable to confer, and where the Court denies the new counsel's motion for a continuance in order to prepare for trial?

Constitutional Provisions Involved.

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall . . . have the assistance of Counsel for his defense."

Statement of the Case.

The trial court had jurisdiction under 18 USC 3231.

The indictment charged 8 counts of violation of 18 USC 1341 (mail fraud) [CT 4-9; Deft. Appx. 2-6]. The search and seizures were made, however, by the Shelbyville, Indiana police [Deft. Appx. 9, 16; RT 231, 242]. Under *Elkins v. United States,* 364 U.S. 206 and *Rios v. United States,* 364 U.S. 253, of course, if petitioner's right to freedom from unreasonable search and seizure was violated, that fact is of no moment.

Defendant is a chiropractor licensed to practice in California, Colorado and Missouri [RT 512]. He is the developer of a machine for colon therapy [RT 516] for which he has a United States patent [RT 526]. This machine has been sold over the years to various types of practitioners in the healing arts, including doctors of medicine [RT 526]. From time to time in connection with the sale of the machine, petitioner has conducted clinics to assure sufficient people come to the doctor's office, so that the technician will have proper training and to acquaint the public with the therapy [RT 539-540]. Petitioner was in Shelbyville, Indiana at the time here involved for such a purpose [RT 540]. The gist of the charges in the indictment was that he caused postcards to be mailed to induce persons to come to the clinic for a free examination and to thereafter pay for treatments by the colon therapy machine irrespective of whether the machine had any therapeutic value for the treatment of the diagnosed ailments. [CT 6].

Acting upon the statement of one who had been at the clinic with his wife in response to a card mailed to them and who said that he thought the persons at the clinic were some quacks and should be investigated [RT 250], the Chief of Police went to the doctor's office to "find out who was in charge, see if they were legally licensed, and if this is a legal operation." [RT 251]. He "didn't get a warrant at all." [RT 263]. At the office, the officer interrogated petitioner as to whether he had a license to operate this clinic [RT 259]. When Mr. Broeringmeyer, petitioner's co-defendant who actually sold the machine in this instance and booked the clinic [RT 9-10], said that he was not a

licensed chiropractor [RT 260] and petitioner could not find his license in his billfold, the officer told them "that they'd better come with me and down to Police Headquarters, and we were going to get things straightened out as to whether they did have a license to practice medicine or they did not;" [RT 260] "that we would have to go down to Police Headquarters where I could do some checking to see if he was a licensed chiropractor." [RT 261-262].

While the officer was thus interrogating petitioner, he seized material in the office [RT 262]. But the officer did not stop at this. Although he had removed petitioner and Mr. Broeringmeyer to Police Headquarters, he "left Captain Kelley there (at the doctor's office) to pick up some additional things, go over the place while I took them down." [RT 262]. This was done, in the words of the officer, "to make sure that nothing in the office was bothered until we were through and completed with our investigation." [RT 278]. All of this material was subsequently at the trial introduced into evidence against defendant over objection that they had been illegally obtained [RT 240, 472]. The theory of the trial court was that this material had been obtained "as an incident of the arrests." [RT 273].

Trial of the case was first set for September 30, 1963 [CT 19]. On motion of defendant because he was ill and awaiting recovery so that the doctor could operate [CT 20, 21], that setting date was vacated [CT 24] and trial date subsequently set for December 9, 1963 [CT 26]. On November 19, 1963 petitioner's then lawyer filed in Court a "motion to withdraw as attorney for defendant." [CT 27]. No copy of this motion was

served upon petitioner prior to its being filed, nor was he advised as to when the motion was to be presented or heard [CT 30]. Nevertheless, on that very same November 19th, the Court granted the motion [CT 27, 31] and caused a copy of its order to be served upon petitioner in Mississippi [CT 31].

Although, just as the letters concerning petitioner's illness written by petitioner and his wife (copies attached hereto as Appendix C & D), and petitioner's letter to his lawyer of November 18, 1963 (the very day before the attorney filed his motion to withdraw) (attached hereto as Appendix E), do not appear in the District Court Clerk's Transcript of Record certified to the Court below, the plaintiff's appendix (p. 9) contains a copy of the letter the United States Attorney wrote petitioner advising him of the Court's order of November 19th and enclosing a copy thereof. Petitioner's lawyer, also subsequent to his having filed the motion, advised defendant that he had done so. On November 19, 1963, he wrote defendant (copy attached hereto as Appendix F):

"Dr. Roy DeWelles
102 McClung
Pass Christian, Mississippi

"Dear Dr. DeWelles:

"Please find enclosed a file marked copy of Motion to Withdraw as Attorney for Defendant which I filed this date.

"Respectfully yours,

Money, Orr, Bridwell & Fink
/s/ Richard M. Orr
Richard M. Orr"

Petitioner, thus, on the eve of trial was without an attorney. He was able to contact the attorney who subsequently did represent him at the trial, on November 25, 1963, and who promptly, as soon as he had obtained a statement from petitioner's doctor [CT 35] filed a Motion to Postpone the December 9, 1963 trial date [CT 32]. In this motion, Mr. Ward attached the statement of Dr. McFarland from Mississippi [CT 32, 35] as to petitioner's hospitalization, that petitioner was scheduled for surgery on December 27, 1963 and that because of his condition, it was prudent to move slowly in preparation for the surgery and that petitioner had been advised to rest daily and avoid physical and mental stresses [CT 35]. Mr. Ward also advised the Court that he had just been contacted by petitioner on November 25 by telephone, had never as of December 4, 1963 [CT 33] met petitioner personally nor had an opportunity to discuss the case with him nor would he have sufficient time to prepare the defense by the December 9, 1963 date [CT 33].

The Court denied the motion for continuance [CT 36]. Accordingly, petitioner was forced to go to trial with a lawyer who had not had the opportunity to prepare and with petitioner, because of his incapacitation, not having been able to contact witnesses, including doctors, who could have testified on his behalf [RT 724].

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME.

I.

This Court Has Never Decided, but Should, the Important Question as to Whether the Fourth Amendment Permits a Search Incident to a Detention for Investigation.

The exception to the rule prohibiting a warrantless search which allows a "search incident to a lawful arrest" has always been posited on the proposition that there was, indeed, an arrest and that the arrest was lawful. (*Beck v. Ohio,* 379 U.S. 89, 91).[2] Otherwise, the search "incident" to the "arrest" is illegal and any evidence obtained thereby is inadmissible. (*Ibid.*)

Perforce, therefore, if there is no arrest there can be no warrantless search incident thereto. The search cannot precede the arrest and then be justified by what is turned up. (*Johnson v. United States,* 333 U.S. 10, 13-14; *McDonald v. United States,* 335 U.S. 451, 454-455; *Agnello v. United States,* 269 U.S. 20, 33; *Jones v. United States,* 357 U.S. 493, 497-498; *United States*

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[2]Even when there is a valid arrest, there are bounds beyond which a search incident thereto may not go, and items which may not be seized, such as evidentiary matter which serve to incriminate the defendant, as distinguished from the instrumentalities of a crime, fruits of the crime, weapons which might be used to effectuate an escape and contraband. (*Harris v. United States,* 331 U.S. 145, 154; *United States v. Lefkowitz,* 288 U.S. 464, 465; *Abel v. United States,* 362 U.S. 217, 234-235.) It would seem that this fundamental rule was violated in the instant case. What was seized and introduced in evidence, was evidentiary material and not the items for which the Fourth Amendment allows a search, *e.g.* X-rays [Exs. 39, 42, 44, 46, 47, 48, 49; RT 280, 281, 285]; Appointment book [Ex. 16; RT 90]; booklet explaining the use of the detoxacolon device [Ex. 5; RT 279]; patient history cards [Exs. 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30; RT 120, 320].

v. Di Re, 332 U.S. 581, 595). A search that is made while the citizen is detained or "arrested" on "suspicion" is invalid. (*Nelson v. Hancock,* 230 F. Supp. 857, 865-869).

Accordingly, where, as here, the officers were detaining defendant in an effort to find out whether they should arrest him and simultaneously searched for and seized materials which were not illegal to be possessed in and of themselves, the defendant's Fourth Amendment rights were violated. Surely the concept of a "search incident to" should not be extended any further than the cases already permit. The question is worthy of examination by this Court.

II.

This Court Has Not Decided, but Should, the Important Question as to Whether the Fourth Amendment Permits a Warrantless Search of the Defendant's Premises in the Absence of Defendant and After the Police Have Taken Him Away to the Police Station.

Assuming that the detention of defendant at the doctor's office was an arrest (*cf. Rios v. United States,* 364 U.S. 253, 261) and that it was valid, a proposition which petitioner strongly disputes, nevertheless, petitioner's Fourth Amendment rights were violated by the search that took place of the premises in his absence and after the police had taken him to their headquarters.

This Court long ago decided that where a defendant is arrested in one place and taken to the police station, a search of his home, albeit upon probable cause, some distance away from the place of his arrest violates the constitutional amendment and evidence so obtained is

inadmissible. (*Agnello v. United States,* 269 U.S. 20; accord: *Stoner v. California,* 376 U.S. 483). This is so even where the defendant is arrested outside his house and the officers make the search "incident to the arrest" inside the house (*Page v. United States,* 282 F. 2d 807 [CA 8 1960]); or where the defendant is arrested on the first floor of a rooming house and search "incident" thereto is made of his room on the second floor. (*United States v. Marrese,* 336 F. 2d 501 [CA 3 1964]).

In *Preston v. United States,* 376 U.S. 364, this Court held as unreasonable a search of defendant's car which was towed to a garage after defendant's arrest in the car and his being taken to the police station. This Court unanimously ruled that even if the police had the right to search the car when they first came on the scene, it was unreasonable for them to search the car later without a warrant. Such a search "is simply not incident to the arrest." (p. 367). Once the defendant had been arrested and taken into custody, "there was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime . . ." (p. 368).

The same principle is applicable here. This Court should settle the question and make clear that the search incident to a lawful arrest concept is a narrow exception to the rule prohibiting a warrantless search and that it will be confined to the specific purposes for which it is allowed. *Abel v. United States,* 362 U.S. 217, did not decide the question, for there the defendant had paid for the room and vacated it; there was no claim that the search of the wastebasket after defendant had left was incident to the arrest and this Court did not consider it to be such (pp. 240-241).

III.

A Defendant Is Denied Due Process of Law, a Fair Trial and the Effective Assistance of Counsel When the Court Permits Counsel to Withdraw From the Case on the Eve of Trial Without Notice to the Defendant, Especially At a Time When the Defendant Is Ill and Unable to Prepare for Trial, and Denies a Continuance to Enable Preparation for Trial.

This Court has consistently recognized that a defendant has a constitutional right to a reasonable opportunity to employ and consult with counsel and that the denial of that right deprives the defendant of due process of law. (*Avery v. Alabama,* 308 U.S. 444, 446; *House v. Mayo,* 324 U.S. 24, 46; *White v. Ragen,* 324 U.S. 760, 764; *Hawk v. Olson,* 326 U.S. 271, 277)., See also, *Gideon v. Wainwright,* 372 U.S. 335 and *Douglas v. California,* 372 U.S. 353. In *Reynolds v. Cochran,* 365 U.S. 525 and *Chandler v. Freitag,* 348 U.S. 3, the Court overturned convictions where the trial courts had denied continuances to enable the defendant to obtain such assistance.

The instant case falls well within the principle of the cases cited. It is true that unlike *Reynolds* and *Chandler,* petitioner here was able to procure an attorney who represented him at the trial, but the mere presence of an attorney is not sufficient to satisfy the Constitutional mandate. The opportunity must be meaningful, "otherwise, the right to be heard by Counsel would be of little worth." (*Chandler, supra,* at page 10). Here, faced with a serious charge which resulted in a conviction and sentence of 10 years imprisonment, defendant had not, even 5 days before trial, met his lawyer

which he had been forced to obtain by the abrupt order of the trial court allowing his previous lawyer to withdraw.

Whatever may be the right of a lawyer to withdraw from a case or the power of a court to allow the lawyer to so do, it would seem manifest that it ought not be permitted to be done without notice to the defendant and without allowing him to be heard as to why the withdrawal should not be permitted. The right to notice and the opportunity to be heard is a fundamental of due process (*Armstrong v. Manzo,* ..... U.S. ....., 33 L.W. 4349, 4351) and it must be granted at a meaningful time and in a meaningful manner (*Ibid.*). This would seem especially so when it is the defendant's own counsel who is involved, for then, truly, the defendant is deprived of the right to the assistance of counsel. (*Cf. Johnson v. United States,* 328 F. 2d 605 [CA 5 1964]; *McCartney v. United States,* 343 F. 2d 471 [CA 9 1965]).

The instant case would appear to be in conflict, in principle at least, with the decision of the Court of Appeal for the Sixth Circuit in *United States v. Johnston,* 318 F. 2d 288 (1963). In that case, the Court held that Friday to Tuesday was not sufficient time to prepare. Here Mr. Ward had not even talked to petitioner the Wednesday before Monday. The Court reversed there; here at least this Court should review.

There is additional reason why defendant was denied a fair trial and why this Court should grant a hearing to protect the integrity of the fair administration of justice. And that is the denial of the continuance of the trial date over and above the question of the denial of counsel.

It is clear that defendant was able to present virtually no defense. He was able to call but one witness other than his wife [R. T. 642]. It is undisputed that petitioner had been ill for some time prior to the trial date; had been in the hospital from September 23, 1963 to October 7, 1963 [C. T. 34] and even at the time his newly hired lawyer was seeking a continuance, petitioner was scheduled for surgery [C. T. 35]. Under these circumstances, petitioner was simply not able to prepare his defense. And this lack of preparation showed up at the trial. While defendant's counsel did the best he could, without witnesses, the defendant had little or no chance.

At the time of sentence, petitioner told the trial judge that had the continuance been granted he would have been able to obtain witnesses to testify on his behalf [RT 724]. This was no idle talk as we shall show in a moment. It is to be remembered that the charge against defendant embodied a specific intent—lack of good faith belief in the efficacy of his colonics treatment. The trial court recognized this in its instructions [RT 688]. With only witnesses who disapproved or disagreed with defendant's mode of treatment before it, the jury chose not to believe in defendant's good faith. Had other and countervailing witnesses been before it, the jury might well have concluded otherwise. Indeed, in the very case about which the prosecution asked defendant's sole independent witness [RT 652]—a prosecution against defendant in Los Angeles—the defendant did have such witnesses and the Court did acquit him (*ibid.*).[3] The

[3]This case was known as *People of the State of California v. DeWelles, et al.*, No. 242700 in the Los Angeles Superior Court. In that case, six witnesses testified that they had taken the treatmen offered by defendant and felt relieved or improved. They

jury in the instant case did not have the benefit of such assistance. By the denial of the continuance, petitioner was deprived of the opportunity to thus present his case.

Illustrative of the witnesses petitioner would have been able to present had he been given the requested time, are letters which petitioner has received—obtained by petitioner at his present counsels' request for use in connection with this petition. We are lodging these letters with the Clerk of this Court for the convenience of the Court and are sending copies to the Solicitor General. These letters are from persons familiar with petitioner's method of treatment from various points of view—doctor, therapist, patient.

It is no answer to say that this preparation should have been done before petitioner's trial and the witnesses presented there. That begs the question. The point is that because of his illness, the distances involved and the time needed to prepare, petitioner was denied the opportunity to adequately present his defense in Court. The denial of the continuance deprived him of this right and of due process of law.

Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted,

A. L. WIRIN,
FRED OKRAND,
Attorneys for Petitioner.

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were Faith Nichols [Tr. 4050, 4064, 4065 in that case], Helen Hannah [Tr. 4091, 4095-96, *ibid.*], Helen Sesczynski [Tr. 4140, 4148, *ibid.*], *Wynona Viewlhaber* [Tr. 4338, 4354, 4355, 4356, *ibid.*], James E. McLaughlin [Tr. 4366, 4373-74, *ibid.*], Ida H. Dempsey [Tr. 6091, 6095-96, *ibid.*].

APPENDIX A.

Opinion of the United States Court of Appeal for the Seventh Circuit.

In the United States Court of Appeals for the Seventh Circuit.

No. 14576 September Term, 1964—January Session, 1965.

United States of America, Plaintiff-Appellee, v. Roy Wright DeWelles, Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

March 29, 1965

Before Schnackenberg, Kiley and Swygert, *Circuit Judges.*

Schnackenberg, *Circuit Judge.* Roy Wright DeWelles, defendant, appeals from a judgment of conviction and sentence, on a verdict of a jury, based upon an indictment charging use of the United States mail in furtherance of a scheme and artifice to defraud, in violation of 18 U.S.C.A. § 1341.

1. He contends that the indictment was insufficient because it di dnot advise him of the crime with which he was charged.

Section 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any

> matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

The indictment charged that defendant and Richard A. Broeringmeyer knowingly caused a postal card to be delivered by mail (to a named person at a designated address) according to the direction thereon, in violation of 18 U.S.C.A. § 1341.

Defendant states that the indictment fails to state that the postal card to be delivered by mail was ever placed in an authorized depository for mail matter to be sent or delivered by the Post Office Department.

Section 1341 states disjunctively three different acts, *inter alia,* which are prohibited, viz.: (1) the placing in any postoffice or authorized depository for mail matter, etc.; (2) the taking or receiving therefrom any mail matter; and (3) "knowingly causes to be delivered by mail according to the direction thereon."

Defendant is in error in his contention. The indictment is based upon knowingly causing to be delivered by mail, which is the third act prohibited by § 1341. It is not based upon the first act, as argued by defendant.

39 U.S.C.A. § 4251 includes as a definition of a postal card "a card supplied by the Department with a postage stamp printed or impressed on it for the transmission of messages, orders, notices and other communications, either printed or written in pencil or ink."

We hold that the indictment is not subject to the attack now made upon it by defendant.

2. It is argued by defendant that counsel who tried the case for him was not permitted sufficient time to prepare for trial.

The indictment was returned on March 19, 1963, and defendant was arrested. He appeared on April 25, 1963 with his own counsel, who obtained a continuance. On June 14, 1963, after the court had overruled a motion to dismiss the indictment, defendant entered a plea of not guilty. In the interim, he had consulted with his own counsel only once, on June 5, 1963, and, after arraignment on June 14, 1963, the case was again called on August 29, 1963, when it was set for trial on September 30, 1963. On October 9, 1963, the case was reset for trial on December 9, 1963. Defendant having failed to respond to his attorney's written inquiries and requests for payment of all or part of his fee, the latter withdrew on November 19, 1963. On November 20, 1963, the United States attorney suggested to defendant by mail that he obtain other counsel. On November 25, 1963, defendant contacted attorney Palmer K. Ward, who represented him at the trial and before this court. Mr. Ward made a motion for continuance on December 4, 1963, which was overruled, and, on December 6, 1963, another motion to dismiss the indictment was filed and overruled.

The trial commenced three days later and defendant's attorney cross-examined all government witnesses. He also moved to suppress certain evidence.

From a complete examination of the record we are convinced that the district court did not abuse its discretion in denying defendant's motion for a continuance.

3. During the course of the trial in the district court, Chief of Police Ezra Dagley of Shelbyville, Indiana, was testifying for the government, when defendant's attorney (to use his own words) "first realized that in fact the said Ezra Dagley did not have a warrant for the arrest of the defendant when such arrest was made." Defense counsel then moved for a mistrial on that ground, plus the fact that counsel had not objected to the introduction of many exhibits and oral testimony for the reason that he believed that a warrant for the arrest of defendant was in existence at the time of the arrest. However, Mr. Ward's cross-examination of Dagley brought out evidence which tended to establish that defendant told him that he (defendant) had a license to practice chiropractic, and that the witness observed a misdemeanor committed in his presence, in that there was a patient being treated and Mrs. Broeringmeyer said Mrs. DeWelles was treating a patient there.

There was evidence tending to prove the following additional facts:

Broeringmeyer's role was to be to contact "doctors" whose names were supplied by DeWelles, and to attempt to interest them in purchasing the DeWelles Detoxacolon instrument and in conducting colon therapy clinics.

In February 1962, physiotherapists Wayne Bull and B. R. Jackson had assisted Dr. Perry Odom, a licensed chiropractor, in establishing an office at Shelbyville. Bull and Jackson had leased an office for Odom in their own names in Shelbyville and were paying the rent. In May, Bull agreed to arrange for a colon clinic to be conducted by defendant in Dr. Odom's office. However,

Broeringmeyer inspected that office and found it too small, so Bull and Jackson rented larger quarters in the Methodist Building and they bought from Broeringmeyer a DeWelles Detoxacolon unit.

Broeringmeyer met DeWelles at Mobile, Alabama, and they and their wives went to Shelbyville with the device and an X-ray machine. They installed the Detoxacolon in the office. They also had a local printer imprint on 10,000 postal cards, purchased at the Shelbyville postoffice, an advertisement[1] of the clinic, and these, after having been addressed to rural route boxholders in the area, were mailed commencing May 31, 1962.

Chief Dagley saw DeWelles' automobile parked in front of the Methodist Building for several days after the latter arrived in Shelbyville. The chief asked him who he was and defendant replied he was Doctor DeWelles from California and was visiting Doctor Odom.

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1 FREE TO YOU! Monday, June 4th, Thru Saturday, June 9th. With This Card.

A PHYSICAL EXAMINATION, usually costing $15 to $25. We will be assisted by one of our best known diagnostic specialists formerly of—CLINICAL RESEARCH INSTITUTE, Kansas City,—Examination Includes:

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If you suffer from Asthma, Arthritis, High Blood Pressure, Epilepsy, Stomach Trouble, Kidney Trouble, Nervousness, Colitis or any other disease, we know you will want to take advantage of this valuable offer, we suggest that you phone EX. 8-9992 for appointment. Examination Without charge only on the above dates.

Dr. Perry Odom, 307 Methodist Building—Phone EX. 8-9992
Chiropractor Shelbyville, Indiana

The clinic operations began on June 4, 1962. Several patients of defendants testified at the trial. Typical is Charles Whittaker who told defendant that his "ankles had been swelling up and ached mostly at night." According to Whittaker, thereupon defendant looked into his eyes, felt on his back and side, and then suggested a colon X ray, to which Wittaker agreed. The X ray was preceded by a barium enema; after the X ray Whittaker waited about one-half hour. DeWelles then brought in two X rays, one of which purported to show a normal colon. He then told Whittaker that his colon "was getting smaller at the outlet and it was causing the pressure to form on my nerves on the hips and legs, and that was what was causing my trouble." DeWelles then explained that to treat his colon, Whittaker should have a two-month course of treatment on an oxygen machine, which would cost $375, with a $25 discount if the entire amount were paid at once. Whittaker told DeWelles he couldn't afford that much, paid $10 for the X ray, and left.

Following a complaint to the county prosecutor on June 5, 1962 by Garl Trees, Dagley and other officers went to defendant's clinic offices and met Mrs. DeWelles and asked to see the doctor in charge. She asked Dagley to come into another room away from the patients. She led him to a room where there was a cot with an X-ray machine positioned over it, and also a desk with two X-ray negatives, a stethoscope, a coke bottle and a crescent wrench lying on it.

On this occasion defendant stated that Dr. Broeringmeyer was the person in charge. When Broeringmeyer was confronted, he stated that defendant was in charge. When Dagley asked for their chiropractic licenses, they

were unable to produce any. He arrested both of them and seized some X-ray negatives and some records.

Defendant contends that he was illegally arrested by state authorities who had no warrant for his arrest and they caused a search of premises wherein defendant was, without a search warrant, and he was never tried by the state authorities upon the arrest they made and the federal authorities are barred from using the fruits of the illegal action of the state authorities.

However, we hold that Chief Dagley, a police officer, was authorized under the law of Indiana to make an arrest in this case for a misdemeanor committed in his presence. *Lander v. State,* 238 Ind. 680, 154 N.E. 2d 507, 509 (1958). Chief Dagley observed events which indicated a violation of Burns' Ind. Stat. Ann. § 63-1336 (1961 Repl.) which provides:

> *63-1336. License required—Penalty for violation.* —No person shall practice chiropractic or hold out as a chiropractor without a license to practice chiropractic in the state of Indiana.
>
> Any person who violates any provision of this act [§§ 63-1326—63-1337] shall be guilty of a misdemeanor and shall be fined in a sum not to exceed five hundred dollars [$500], to which may be added imprisonment for any determined period not exceeding ninety [90] days. Each violation shall constitute a separate offense.

In *Ker v. California,* 374 U.S. 23, 34 (1963), Mr. Justice Clark pointed out that the evidence at issue in that case, to be admissible, was required to be the product of a search incident to a lawful arrest, since the officer had no search warrant. He also pointed out

that the lawfulness of the arrest without a warrant, in turn, must be based upon probable cause,

> "* * * which exists 'where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.' * * *"

In the case at bar, as we have pointed out, the facts known to Chief Dagley before and upon his entering the office or clinic of defendant clearly furnished grounds for a reasonable belief that defendant had committed the offense of practicing chiropractic and holding himself out as a chiropractor, without a license to practice chiropractic in that state. The information which the police officer had in this case is to be considered in establishing whether he had probable cause for the arrest and subsequent search of the office. We cannot say that at the time of the arrest or the search there were not sufficient grounds for a reasonable belief that defendant was committing the offense of practicing chiropractic without a license in the State of Indiana in the presence of the officer.

The result which we reach in this case is also supported by the fact that Chief Dagley had probable cause to believe that defendant, on the said premises, had violated the Indiana law making it a felony to obtain money by false pretenses.[2]

---

[2]At the date alleged in the indictment, Section 10-2103 Burns' Ind. Stat. Ann. (1956 Repl.) provided in pertinent part that:

> Whoever, with intent to defraud another, designedly, by * * * any false pretense * * * obtains from any person * * * any money * * * check, or thing of value * * * shall, on conviction, be imprisoned in the state prison * * *.

For these reasons, the judgment from which this appeal has been taken is affirmed.

Judgment Affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B.

United States Court of Appeals for the Seventh Circuit Chicago, Illinois 60610

Monday, March 29, 1965

Before Hon. Elmer J. Schnackenberg, Circuit Judge Hon. Roger J. Kiley, Circuit Judge Hon. Luther M. Swygert, Circuit Judge

United States of America, Plaintiff-Appellee, vs. Roy Wright DeWelles, Defendant-Appellant. No. 14576

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX C.

102 McClung Street
Pass Christian, Mississippi
September 7, 1963

Mr. Richard M. Orr
Money, Orr, Bridwell & Fink
304 First Federal Building
Indianapolis 4, Indiana

Dear Mr. Orr:

I received your letter of August 30th, and will bring you up to date on things here since I came back from Indiana and the arraignment.

As arranged with the Court, I went to California about the first of July. My purpose being to get material and look up and arrange witnesses to appear in my defense. Also to acquire some money for attorney fees and other expenses.

I had been in California less than 48 hours when, at about 3 A. M. I was stricken with an excruciating pain at my gall bladder, going through to my back. I could hardly breathe. It was Sunday and I was staying with my Mother. Monday I was worse so a Dr. Wendell J. Mellor, M.D. of 6753 Hollywood Boulevard, Hollywood, California, was called and that afternoon he made a house call, decided I had an infected kidney, gave me a shot of penicillium. I was by this time having terrific chills lasting some 40 mintes. Dr. Mellor made three calls and was in contact by phone for several days during which his diagnosis was changed three more times but the attack did not subside for days and I

was in bed nine days. By then I had lost 20 pounds and was too weak to hardly move. Fearing return of the attack and emergency surgery I had my Mother get me to the airport for home as soon as I felt I could stand the jar of the car going to the airport. My Mother is 77, alone, and I was in her single bed while she had piled up on a divan while I was there. I needed to be where I coud get competent care as I did not have money for nurses.

When I first got home I was in bed several days, then dressed and sat or dragged around the house for two weeks but got very little strength or weight back but finally tried again about the first of August, this time driving to save money. I wanted to get properly prepared for the trial and get it over with as I feel I can certainly prove I'm not guilty.

Well, driving I got to Phoenix, Arizona, on Saturday night and at 2:25 A. M. I had another attack, the same. The same pain and the same chills only harder chills. I almost shook out of bed. By noon Sunday my fever broke and I got into my clothes, crawled into the car which fortunately was by the motel door, and I got into Los Angeles and back into bed again for 5 days with Dr. Mellor again attending. Several more days getting a little strength until I could get going and so I got my Mother to bring me back here, where I have been — until last Monday night, September 2nd, in the middle of the night it hit me again — this was the third time. So, I've been flat on my back again.

This time I have had Dr. McFarland of the McFarland Clinic, Bay St. Louis, Miss. He is certain it is a non-functioning, infected gall bladder that must come out.

I am going to the Hancock General Hospital tomorrow morning for certain tests, of pancreas, blood, gall bladder and gastro-intestional tract and to determine if the gall bladder is too "hot" to take out now or what.

Under the circumstances that it has been physically impossible for me to make any preparation up to now and I must do considerable travelling to look up witnesses and personally urge them to go to Indiana to appear for me and, too, I need the money that you are demanding, I feel I must have about a 90 day continuance and I pray the Court would kindly consider the situation. This case has come up a long way from my home base and where my witnesses are.

I swear this entire statement is true under penalty of perjury. Please see what you can do and let me hear from you at once as Mrs. DeWelles and I are worried until we can't sleep.

Yours truly,

Dr. Roy W. DeWelles

RWD:ZHD

CC: Hon. Judge S. Hugh Dillin
Federal Bldg.
Indianapolis, Ind.

APPENDIX D.

102 McClung Street
Pass Christian, Mississippi
October 19, 1963

Mr. Richard M. Orr
Money, Orr, Bridwell & Fink
304 First Federal Building
11 North Pennsylvania Street
Indianapolis, Indiana

Dear Mr. Orr:

In answer to your letter of October 14th in which you stated the date of the case being assigned on December 9th, I feel I should let you know of the serious condition that my husband still remains.

As stated in his letter of September 9th in which he related the frequency of the attacks that he has suffered this summer and also the telephone call I made to you when my husband was in the hospital, will confirm the seriousness of his condition. On the 16th of September in the early morning the doctor was called (Dr. McFarland of Bay St. Louis) and his belief was at that time that Dr. DeWelles would be in the hospital before the week was over. He had to go to Jackson, Mississippi for Post Graduate work and had to leave that morning but he recommended the surgeons, Drs. Barkley and Byrne of Pass Christian and Gulfport in the event that we would need to call another doctor on the case. That evening around 4:30 my husband took violently ill, with almost uncontrollable vomiting along with such intense pain that it was almost impossible for him to breathe. It took me two hours to reach Dr. Byrne and it being late in the evening I called six other

offices trying to get someone in an emergency but I could not find anyone who could come. Dr. Byrne came about 7 that evening and advised him to be hospitalized and immediate surgery or his chances for survival would be very slim. We did not feel he could live through surgery at that time but an hour later we called the doctor and an ambulance and took him to Memorial Hospital in Gulfport. Dr. Byrne had given him an injection of antibiotics and one for pain but it had no effect whatsoever and the pain increased.

After arriving at the hospital laboratory tests were begun preparatory to the anticipated surgery. The vomiting continued in spite of all the medications which were administered. The pain was generalized by this time and very severe. Dr. Byrne was fearful that the gallbladder had ruptured and in that event the chances for gangrene or peritonitis were very great. My husband was very much against surgery at that time because the blood tests revealed that he had a diabetic condition which had not been discovered previously. His blood sugar was 240, normal being 90 — 120. The white blood cell count rose to 27000, normal being 7500. Sugar was also showing in the urine and his general blood picture and condition were not a healthy one. For a period of ten days my husband lay critically ill and the decision each day as to the best procedure to follow were very trying for all of us. My husband did consent to surgery but the surgons felt that his condition by this time was such that survival was very slim and they gave me no hopes that he would recover at this time. On the 9th day he took violently ill again with the vomiting returning and after getting up a quantity in excess of 5 quarts, some being food that had

been in his stomach for over a period of a week, the doctors concluded that in addition the highly inflamed gall bladder, he had an obstructed stomach. They inserted a Levine tube into the stomach and left it for a period of 18 hours which gave him some relief. By this time Dr. DeWelles was so dehydrated and weak that he could hardly speak and he had had less than 5 hours sleep during this period in spite of heavy dosages of sleeping tablets and injections. Intervenious feeding was begun and 5 quarts were given without stopping throughout the night. On Thursday morning X-rays were made and it was the conclusion of the doctors that the stomach was open but it is necessary that he remain on medication for it to remain so. Drs. Byrne and Barkley made calls every day and night for the 2 week period that he remained in the hospital.

Needless to say, the severe illness had taken its toll along with the loss of 27 pounds and it has been necessary for my husband to remain in bed much of the time and on such a limited diet he has not been able to regain the strength he so sorely needs. The doctors have advised surgery at the earliest possible minute after they feel this acute condition has subsided. They are fearful there is an abscess in the abdomen and if there is, surgery may have to be performed at any time to drain it if it should suddenly flare up. Their hope is that he can build up for a period of 6 weeks and then have the gall bladder removed. If all goes well, he should have a normal recovery.

Mr. Orr, I did not intend to burden you with his condition but I do want you to know that it has been most serious and for many days I wondered if my husband would live to see another day. Under these

circumstances, his coming to Indiana for trial in December seem very remote for it is imperative this surgery be performed and if it is, he could not possibly appear at that time.

We may take him to New Orleans to the Oschner Clinic for the surgery if there seem to be any complications before surgery. I will keep you informed as to his condition and will let you know when the doctors feel it is reasonably safe for him to appear. He is anxious to have this case over so that he can return to a state of mind that is peaceful.

Zella H. DeWelles, (Mrs. R. W.)

APPENDIX E.

102 McClung Street
Pass Christian, Mississippi
November 18, 1963

Mr. Richard M. Orr
Money, Orr, Bridwell & Fink
304 First Federal Building
11 North Pennsylvania Street
Indianapolis 4, Indiana

Dear Mr. Orr:

With reference to your letter of November 11th, I refer you to my last letter dated October 19th, actually from Mrs. DeWelles, in which she outlined in considerable detail what I have been through physically since I saw you last. At this time I am still quite ill, although I am up and around the house and have on one or two occasions gone into town, each time returning completely exhausted. Due to this abscessed gall bladder that I am carrying around I am unable to gain strength and ache in every joint I have. The doctors seem to think that I should have this out at the earliest feasible moment before I have another attack, which could easily mean rupture or gangrene had occurred. Yet, they want as much time as possible to allow nature to wall off 'something or other' and give me a better chance of recovering.

The date for this operation has been tentatively set for about the fifth of December, if I can go that long so this is the situation from the physical standpoint. Also, I have had no opportunity to contact widely scattered witnesses, mostly all doctors, to induce them to appear in my defense and bring some

former patients if possible. This all would take me at least a month or six weeks of travel and preparation with you so it seems to me that another continuance is the only thing possible under the circumstances.

I hope you can impress upon the Court, whom impressed me as being a very fair and reasonable gentleman that I am not a malingerer, that I am very anxious to have this case heard in order to clear my name as I have every confidence that the proof when properly presented can result only in an acquittal of these charges.

Also the longer this thing, both the physical and the Court problems are delayed, the longer it will be before I am able to get out and earn a dime to support my family.

With reference to the payment on your fee, I am at this time trying to sell some personal property to take care of it. In the meantime, won't you please be patient a little longer and file this motion to suppress. You will not regret it.

Yours truly,

/s/ Dr. Roy W. DeWelles

APPENDIX F.

[Letterhead]

November 19, 1963

Dr. Roy DeWelles
102 McClung
Pass Christian, Mississippi

Dear Dr. DeWelles:

Please find enclosed a filed marked copy of my Motion to Withdraw as Attorney for Defendant which I filed this date.

Respectfully yours,

Money, Orr, Bridwell & Fink
/s/ Richard M. Orr
Richard M. Orr

RMO:jb
Enclosure

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783-274—65

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 325

ROY WRIGHT DE WELLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A; R.C.A. 1–7)[1] is reported at 345 F. 2d 387.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1965 (Pet. App. B). A petition for rehearing was denied on May 7, 1965. By order of Mr. Justice Clark, the time for filing a petition for a writ of

[1] In conformity with petitioner's designations (Pet. 1), "R.C.A." refers to the volume containing the record in the court of appeals, "R.T." refers to the three-volume reporter's transcript of the trial proceedings, and "C.T." refers to the volume containing the clerk's transcript of the matters before the district court.

certiorari was extended to and including July 6, 1965, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial court properly found that a search was incident to a lawful arrest by State officials so that the items seized were admissible as evidence.

2. Whether the trial court abused its discretion in denying petitioner's second motion for a continuance.

STATEMENT

Petitioner was convicted after a trial by jury, in the United States District Court for the Southern District of Indiana, on seven counts of an indictment charging use of the mails in furtherance of a scheme to defraud, in violation of 18 U.S.C. 1341.[2] He was sentenced to five years' imprisonment on one count, and to five years' imprisonment on each of the remaining six counts, the latter terms to run concurrently with each other and consecutively to the term first imposed (R.T. 731). The court of appeals unanimously affirmed the conviction.

1. The evidence disclosed that petitioner, a California chiropractor (R.T. 481, 511–512), had developed a machine which he called a "Detoxacolon" (R.T. 516). It was assertedly to be used for the treatment of asthma, cancer, arthritis, high blood pressure, polio, epilepsy, genital problems, and numerous

[2] Richard Broeringmeyer, who was also named in the indictment, pleaded guilty on one count before trial (R.T. 5).

other ailments (R.T. 19, 128–131, 137–138, 307–328, 400). To effect such treatments, the machine pumped water and oxygen into the patient's colon (R.T. 133, 520, 535).[3] In 1961, petitioner persuaded one Broeringmeyer to become a salesman of his machine (R.T. 9).

In May 1962, Broeringmeyer communicated with an Indiana physical therapist called "Doctor" Bull (R.T. 25–27, 172).[4] Bull and another physical therapist, "Doctor" Jackson, had been supporting an alcoholic chiropractor named Odom (R.T. 173–176, 188–189), and were anxious to be relieved of the responsibility (R.T. 176, 180, 189–190, 193). Thinking that petitioner's machine might help Odom establish some kind of practice (R.T. 177), they rented an office for Odom in Shelbyville, Indiana (R.T. 183), and executed an agreement with Broeringmeyer for the conduct of a "clinic" and the purchase of the machine (R.T. 28–29, 33–34). Later that month a "Detoxacolon" and an X-ray machine were brought to Shelbyville by petitioner and his salesman and were installed in the office rented for Odom (R.T. 38, 81, 87–88).

Shortly after his arrival in Shelbyville, petitioner had several thousand postal cards printed and mailed to rural box-holders in the Shelbyville area (R.T. 86–87, 212–216, 218–220, 222–223, 226–227). The cards offered a thorough, free physical examination to any

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[3] Recognized medical and chiropractic authorities considered the use of the machine not only valueless, but dangerous (R.T. 306, 309, 324, 326, 334–335, 338–339, 342, 352, 666–668).

[4] A physical therapist is not authorized to use the title "doctor" (R.T. 171).

recipient who telephoned for an appointment during the designated six-day period. Although Odom was not aware of the existence or nature of the cards (R.T. 198), they were sent out in his name, and they set forth his telephone number and the address of the office rented for him. The telephoned appointments prompted by the advertisement were booked by petitioner and Broeringmeyer (R.T. 88–89, 199).

Operation of the six-day "clinic" began on June 4. Upon the arrival of each patient, either petitioner or Broeringmeyer[5] would give him a perfunctory examination, substantially more limited than that which had been advertised,[6] and listen to his complaints (R.T. 64–65, 94–95, 151, 365, 381, 395, 409–410, 420–422). Petitioner or Broeringmeyer would then advise an X-ray of the colon for which a charge of $10 would be made (R.T. 64–65, 103–104, 151–152, 366, 387, 396, 410, 423). The patient would be given a barium enema and X-rayed. Within half an hour, petitioner would return with an X-ray negative of the patient's colon and an X-ray negative of an allegedly perfect colon for comparison (R.T. 66, 76, 154, 165, 368, 384, 411, 415, 425). Petitioner would point out to the patient any differences between the two, describe the difference as an abnormality, and attribute to the difference the symptoms of which the patient had

[5] Although Odom was occasionally at the office, he was always inebriated and he examined no patients and performed no function of any kind (R.T. 92, 94, 110, 185, 197, 199–200).

[6] Petitioner examined one patient by looking into his eyes and by feeling his back and sides (R.T. 410). Another was given no examination at all before being told an X-ray would be necessary (R.T. 50–51, 57).

earlier complained (R.T. 66, 76, 154, 384–385, 399–400, 415, 425). Petitioner would then suggest a prompt course of treatments with the "Detoxacolon" machine, quoting a price between $125 and $2,000 for the series (R.T. 67, 155, 369–370, 385–386, 401, 412, 425–426), and offering a discount if the entire amount were prepaid in cash (R.T. 67, 156, 390, 401, 413). If the patient agreed to the series of treatments, the first would be scheduled at the time of payment (R.T. 69, 157, 403).

2. One of the patients who arrived for a free examination was an 80-year-old man who became suspicious of the procedure (R.T. 40, 44–46). The man later talked to a friend (R.T. 51) who had developed similar suspicions after visiting the clinic. The friend reported the entire matter to the local chief of police (R.T. 250–251). The chief, with the city prosecutor and the local sheriff (R.T. 235), went to the clinic on June 5 to see if the operators were "legally licensed" (R.T. 251). As they approached the office, the chief of police met an acquaintance who said that he had just paid for a treatment (R.T. 251–252).

The chief then entered the office, observed several persons sitting in the waiting room, and introduced himself to Mrs. Broeringmeyer (R.T. 235, 253). Mrs. Broeringmeyer took him to meet petitioner's wife (R.T. 235), who came out of the "Detoxacolon" treatment room in which a patient was seen lying on a cot (R.T. 236–237, 253, 258). Petitioner's wife asked the chief to accompany her into another room "away from the patients" (R.T. 236, 254). They passed a

darkroom (R.T. 237), and entered a room containing an X-ray machine and a desk upon which lay several X-rays and a stethoscope (R.T. 236–237, 254, 256). The chief asked petitioner's wife the number of doctors in the "clinic" and the name of the doctor in charge (R.T. 257). She replied that they had two doctors, petitioner and "Doctor" Broeringmeyer, and that "Doctor" Broeringmeyer was in charge (R.T. 237, 257). She then excused herself for the announced purpose of releasing a patient (R.T. 237, 257–258). The sheriff thereupon questioned Mrs. Broeringmeyer, who said that the doctor in charge was petitioner (R.T. 238).

Petitioner soon entered the room and stated that "Doctor" Broeringmeyer was in charge (R.T. 258, 276). Broeringmeyer then came out of the darkroom and replied that petitioner was in charge (R.T. 259, 277). The chief said that he had heard enough, and asked whether either of two men had a "license to operate this clinic, chiropractor license" (R.T. 259). After each first stated that he was licensed (R.T. 259, 277), Broeringmeyer admitted that he was not a chiropractor (R.T. 260, 277), and petitioner explained that he could not find his license (R.T. 260). The chief told Broeringmeyer he "was under arrest and that, if [petitioner] didn't have a license, he was under arrest" (R.T. 262, 267, 269). The chief then seized the book in which the patient's appointments were recorded, an instruction book on the "Detoxacolon" machine, some patient history cards, and several X-ray negatives (R.T. 262, 278, 301). Under

the chief's custody, petitioner and Broeringmeyer and their wives were taken to the police headquarters (R.T. 260, 269, 278), where it was ascertained that no Indiana license had ever been issued for petitioner. The chief swore out a complaint charging both petitioner and Broeringmeyer with practicing chiropractics without a license (R.T. 260–261). The objects seized from the clinic were admitted as evidence at the subsequent trial. The court denied petitioner's motion to suppress (R.T. 240–241, 273; see R.T. 472), finding that the search was incident to a lawful arrest (R.T. 272–273).

3. On March 19, 1963, over nine months after petitioner's arrest by the chief of police, the present indictment was returned (C.T. 4). On April 1, petitioner, who was then staying in Mississippi, was arrested by federal agents, taken before a commissioner, and released on bond. He appeared with a retained attorney on April 25 and secured a continuance of his arraignment (C.T. 10–11), which ultimately was held on June 14 (C.T. 18). On this latter date, he assured his retained attorney that he would furnish him with a written history of the case and with a list of proposed witnesses and their expected testimony (C.T. 28). Thereafter the attorney informed petitioner that the trial date had been set for September 30 (C.T. 28). On September 7, petitioner wrote his attorney and the trial judge that he was ill, and that he needed a 90-day postponement of the trial (C.T. 28; Pet. App. 13). Petitioner's attorney moved for a continuance on this basis on September 19

(C.T. 20–21), and on September 24 the motion was granted (C.T. 24). Two days later, the court ordered that petitioner appear for a physical examination at the office of a named physician in Mississippi (C.T. 25). Petitioner did not appear. On October 14, the attorney wrote petitioner that the trial had been reset for December 9 (C.T. 29), and in three separate letters advised him to see the physician designated by the court in order to verify that he was critically ill (C.T. 28–29). In the last such letter, dated November 11, the attorney also advised petitioner that unless a substantial portion of the retainer fee were soon paid, he would have to withdraw from the case (C.T. 29). On November 19, not having heard from petitioner, the attorney explained the above facts to the court and moved to withdraw (C.T. 27–30). The motion was granted and petitioner was notified (C.T. 31; Pet. 7).

On November 25, petitioner secured a second attorney to represent him (C.T. 33). On December 4, the second attorney moved for a continuance, alleging that petitioner had been hospitalized with a gall bladder inflammation from September 23 to October 7 and was to avoid the stress of a trial prior to an operation scheduled for late December, and alleging that the attorney would not have time to prepare a defense by December 9 (C.T. 32–33). The motion was denied on December 4 (C.T. 36). A motion to dismiss the indictment was denied on December 6 (C.T. 38–40); trial began on December 9 (R.T. 2); and the presentation of the defense case began December 12 (R.T. 469, 478).

ARGUMENT

1. The X-rays and papers seized from the "clinic" by the chief of police were admissible as evidence since they were obtained as incident to a valid arrest. The chief of police plainly had probable cause to believe, and did believe (R. T. 267), that petitioner and Broeringmeyer were practicing chiropractics without a license, in violation of a State statute (Burns' Ind. Stat. Ann. § 63–1336 (1961 Repl.)). State law empowered the chief to arrest such observed misdemeanants without a warrant. *Lander* v. *State*, 238 Ind. 680, 154 N.E. 2d 507. He effected the arrests by expressly announcing that Broeringmeyer was under arrest and that petitioner was also "if he didn't have a license" (R.T. 262), by stating that they "would have to go" with him to the police station (R.T. 261), and by actually assuming custody over them (R.T. 269). There is no merit to petitioner's suggestion that he was not then under arrest because the chief's announcement was conditioned on a future finding that petitioner had no license (Pet. 9–10). The existence of an arrest is not predicated on the words employed, but on the intended assumption of custody and actual assertion of dominion and control. See *Henry* v. *United States*, 361 U.S. 98; *Bolger* v. *United States*, 189 F. Supp. 237, 251 (S.D. N.Y.), affirmed *sub nom. Bolger* v. *Cleary*, 293 F. 2d 368 (C.A. 2), reversed on other grounds, 371 U.S. 392.[1]

[1] In any event, there was no ambiguity in the words used to announce the arrest of Broeringmeyer (R.T. 262, 269), and the accompanying search was independently lawful as an incident of that arrest.

Contrary to petitioner's allegation (Pet. 10), the incidental search occurred before the chief took petitioner and Broeringmeyer to the station (R.T. 262). The chief testified that the objects were seized by him (R.T. 262, 278, 301–302), and on some of them he identified his initials written at the time of seizure (R.T. 279–281).[8] The objects seized were "the things used to carry on the criminal enterprise" (*Marron* v. *United States*, 275 U.S. 192, 199) and were, therefore, subject to seizure at the time of arrest. *Abel* v. *United States*, 362 U.S. 217, 237–238.

2. There was no error in the denial of petitioner's second motion for a continuance. The only grounds offered to secure a delay were petitioner's need for pre-surgery rest and the attorney's need for more time to prepare. In evaluating petitioner's need for rest, the court properly could consider petitioner's apparent disinclination to be examined by the court-designated physician, even after the date originally set (C.T. 28–29).[9] As to the alleged need for more time to

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[8] The chief did testify that he "left Captain Kelley there to pick up some additional things" (R.T. 262), but there is no basis in the record for assuming that any of the items introduced into evidence were the "additional things" which Captain Kelley had obtained.

[9] A letter from another doctor accompanied the motion (C.T. 35), but in view of the nature of the case, it was especially important that the court know the identity and reputation of any doctor submitting written statements. As the court later observed, a doctor submitting a statement could be "one of [petitioner's] many associates" (R.T. 725). For example, Dr. Hawk, the medical doctor whose letter petitioner has lodged with the Clerk of this Court, was a septuagenarian on the staff of a now-defunct clinic administered by petitioner (R.T. 710–711).

prepare, it does not appear that eight months after the indictment was served and two weeks after the second attorney was retained was an unreasonably early time to begin trial. See *United States* v. *Kelley*, 186 F. 2d 598, 600 (C.A. 7), certiorari denied, 341 U.S. 954. The limited time for the second attorney's preparation was directly attributable to petitioner's lack of cooperation with his first attorney. See *Torres* v. *United States*, 270 F. 2d 252, 254 (C.A. 9), certiorari denied, 362 U.S. 921.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Petitioner's Reply to Brief for the United States in Opposition.

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1. Respondent is in error in its assertion (p. 10) that "the objects seized were 'the things used to carry on the criminal enterprise' . . . and were, therefore, subject to seizure at the time of arrest."

In the first place, it must be remembered that the charge upon which petitioner was tried was violation of 18 U.S.C. 1341 (mail fraud) [C. T. 4-9; Deft. Appx. 2-6]. The elements of that offense are (1) the formation of a scheme with intent to defraud, and (2) the use of the mails in furtherance of that scheme (*United States v. Shavin,* 287 F. 2d 647, 649 [CA 7 1961]; *Webb v. United States,* 191 F. 2d 512, 514 [CA 10 1951]; *Krueter v. United States,* 218 F. 2d 532, 533 [CA 5 1955], cert. den. 349 U.S. 932).

The objects seized and admitted into evidence (see footnote 2, p. 9 of Petition) can hardly be said to be the means of carrying on the criminal enterprise charged. At most, they are evidentiary; hence not seizable. (*Harris v. United States,* 331 U.S. 145, 154).

Even if it be considered that the ambiguity in the record amounts to an arrest for some state crime as to which petitioner was not tried, such as practicing chiropractic without a license, the items seized (*e.g.* photographs [Exs. 51-53, 55-56, R. T. 289], Technical Manual Explaining How to Use the Detoxacolon [Ex. 5, R. T. 20], appointment book [Ex. 16, R. T. 60], checks [Exs. 62 and 66, R. T. 402 and 470]) are certainly not the "means" or "instrumentalities" of the crime. At most, they are again only evidentiary and therefore not seizable.[1]

Respondent concedes (p. 10, f.n. 8) that the search conducted after petitioner left, or was taken from, the office was illegal and that any objects then taken were inadmissible. Respondent is in error, however, in its assertion (*ibid*) that the record does not show that any of those "additional things" were admitted at trial. The Chief of Police testified precisely to what he took from the offices at the time the arrests were made [R. T.

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[1]As to some of the items seized, set out in footnote 2, page 9 of the Petition for Writ of Certiorari, petitioner's counsel at first made no objection. This was because, due to the insufficient time for counsel to prepare for trial, petitioner's counsel thought the police officers had a search warrant [R. T. 240]; so also did the Court [*ibid*]. Immediately upon his being apprized of the true facts [*ibid*], counsel argued that all the evidence seized at the office was not admissible [*ibid*: R. T. 244, 246, 270], and moved for a mistrial based thereon [R. T. 274]. The Court overruled the motion [R. T. 275]. It also overruled defendant's motion at the close of the Government's case based upon the illegal seizure [R. T. 472, 477].

278]: "I took several articles, x-rays, x-ray film. I took an appointment book and a book on the machine that was being used in the office."[2] But there were other "additional things" taken from the office which were admitted into evidence and which, in the light of the Chief of Police's testimony could only have been seized during and as a result of Captain Kelley's search in the absence of defendant. For example, case history cards [Exs. 18-30; R. T. 101-102]; checks [Exs. 62 and 66, R. T. 402, 405, 427, 429]; chart relating to use of Detoxacolon [Ex. 4; R. T. 20] sales kit [Ex. 3, R. T. 18]; pamphlet "Let's Live" [Ex. 68; R. T. 613, 615].

2. Respondent asserts (Br. 10) as justification for the trial court's order denying the continuance to petitioner's on-the-eve-of-trial counsel, "petitioner's apparent disinclination to be examined by the court-designated physician." This assertion is most unfair and is contrary to the record. The fact is that petitioner, who was in the hospital on October 3, 1963 [C. T. 34] the date he was to have been examined by Dr. Stewart [C. T. 25], did not know of the order which had been made, until October 25, 1963 when he received a letter from his former attorney advising him of the Court order for examination on October 3rd [C. T. 32]. As soon as he received this letter, he contacted Dr. Stewart who advised him that the papers had been returned to Indianapolis and that there was no need to appear for a physicial examination [C. T. 32].

The picture presented by the record in this case is one of an accused in a criminal proceeding having been

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[2]He also testified [R. T. 286] that he had photographs taken which were also admitted into evidence [Exs. 51-56; R. T. 289].

denied, through no fault of his own—illness can strike anyone—a fair trial through lack of an opportunity to prepare and to be adequately represented by counsel.

Conclusion.

The petition for writ of certioari should be granted.

Respectfully submitted,

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